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IN THE

SUPREME COURT OF THE UNITED STATES.

1967

BERTRAM S. ROSS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit.

SEYMOUR SAMUELS, JR.,
WILLIAM R. WILLIS, JR.,
214 Union Street,
Nashville, Tennessee,
Attorneys for Petitioner.

Of Counsel:
HOOKER, HOOKER & WILLIS,
214 Union Street,
Nashville, Tennessee.

ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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To the United States Court of Appeals For the Sixth Circuit.

The petitioner prays that a writ of certiorari be issued to review a judgment and order, entered March 2, 1967, by the United States Circuit Court of Appeals for the Sixth Circuit in Case No. 17062 of that court sustaining the conviction of the petitioner by the United States District Court for the Middle District of Tennessee for violation of the Federal Travel Act, Section 1952, Title 18, U. S. C.

OPINION BELOW.

The opinion of the Court of Appeals for the Sixth Circuit has not been generally reported, but a copy thereof is appended to this petition as Appendix A.

STATEMENT OF JURISDICTION.

The United States District Court for the Middle District of Tennessee, Nashville Division, sitting without a jury, entered a judgment of guilty against the petitioner under

a one count indictment on charges of violation of 18 U. S. C. 1952, in that he wilfully caused others to use the United States mail to send to him from Chicago, Illinois, to Nashville Tennessee, a certain sports publication with the intent to "promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, that is, a business establishment involving gambling in violation" of the laws of Tennessee. The United States Court of Appeals for the Sixth Circuit affirmed this judgment of conviction on March 2, 1967. Jurisdiction to entertain this petition is conferred on the Supreme Court of the United States by 28 U. S. C., § 1254 (1).

QUESTIONS PRESENTED.

1. Is the filing by a defendant of a monthly wagering excise tax return, mandatorily required by 26 U. S. C., § 4401 and § 4403, evidence which may be used to convict him of violating the Federal Travel Act, 18 U. S. C. 1952?

2. Is the possession by a defendant of a Federal Wagering Tax Stamp as required by 26 U. S. C., § 4411 and § 4901 (c), evidence which may be used against him to convict him of violating the Federal Travel Act, 18 U. S. C. 1952?

STATUTES INVOLVED.

The statutes involved are 18 U. S. C. 1952, 26 U. S. C., § 4401 and § 4403, and 26 U. S. C., § 4411 and § 4901 (c), which are set forth in more detail in Appendix B to this petition.

STATEMENT OF THE CASE.

The evidence in this case is substantially as stated in the opinion of the Court of Appeals and the sole question is whether the evidence is sufficient to sustain the conviction. The petitioner did not testify at the trial nor was

any testimony submitted on his behalf. The only evidence introduced by the respondent was the testimony of two FBI agents who stated that they found certain publications in the yard of the petitioner's home which, as described in a bill of particulars, was identified as follows:

> "1. The name of the publication is the Angel-Kaplan Sports Publication. The date if (sic) issue is unknown, but is Voluume XXXV—'Special Bowl Edition'; as the description, the publication contains a schedule of bowl games for 1964-65, a photostatic copy of which is attached hereto."

There was no proof that the petitioner used the Angel-Kaplan Publication referred to in the taking of any specific wagers or bets. There was no specific evidence to show that the said Angel-Kaplan Publication was used to aid or facilitate the substantial acts of state law violation. The trial court and the Circuit Court of Appeals inferred its use to facilitate substantial acts of state law violation from the fact that one of the petitioner's businesses was taking bets on ballgames. The only evidence of petitioner's business of taking bets was his testimony on the motion to suppress the evidence which was extra-judicial admissions to one of the FBI agents.

Since the petitioner's extra-judicial admissions require corroboration before they may be used as evidence against him, **U. S. v. Calderon**, 348 U. S. 160, the Circuit Court of Appeals held that ". . . **substantial evidence to corroborate such admissions is found in appellant's possession of Federal Wagering Tax Stamps and his filing of monthly Wagering Excise Tax Returns and the fact that an envelope containing the rundown sheets addressed to the appellant was found on his premises**, . . ." (App. A).

It is clear from the opinion of the Court of Appeals that there would have been insufficient corroborating evidence upon which to base a conviction if the petitioner's

possession of Federal Wagering Stamps and the fact of his filing monthly Wagering Excise Tax Returns had not been considered as evidence.

REASONS FOR GRANTING THE WRIT.

The filing of Wagering Excise Tax Returns and obtaining Federal Wagering Tax Stamps is mandatorily required of those engaged in such business by the provisions of Title 26, U. S. C., § 4401 and § 4403 and of § 4411 and § 4901 (c) respectively. The use of such stamps and the fact of the filing of such returns, mandatorily required by a revenue law, in a criminal prosecution is a violation of the petitioner's rights against compulsory self-incrimination under the Fifth Amendment to the Constitution of the United States.

In the cases of **Frank Costello v. United States**, 383 U. S. 942 (352 F. 2d 848), and **Grassia v. United States**, 354 F. 2d 27, this Court has under consideration the constitutionality of the tax on wagering imposed by Title 26, U. S. C., § 4401 and the tax on persons engaged in wagering imposed by 26 U. S. C., § 4411.

The petitioner respectfully asserts that if a revenue law is unconstitutional because the reporting and registration requirements in such law compel those subject to it to give statements which may be used against them in a criminal prosecution, then, by the same reasoning, the use of such reporting and registration as evidence to support a criminal conviction is also unconstitutional. A conviction, the validity of which depends upon such evidence, should not be permitted to stand.

The use of the reporting and registration requirements of the revenue laws relating to wagering are, in legal effect, similar to the registration and reporting required under the Subversive Activities Control Act of 1950, 50 U. S. C., § 786 (d) (4) which the Court held to be uncon-

stitutional in **Albertson v. Subversive Activities Control Bd.**, 382 U. S. 70, 15 L. ed. 2d 165, November 15, 1965.

In **Albertson v. Subversive Activities Control Bd.**, *supra*, this Court, in distinguishing Albertson from the ruling in **U. S. v. Sullivan**, 274 U. S. 259, 71 L. ed. 1037, said: "In Sullivan the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners' claims are not asserted in an essentially non-criminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admissions of a crucial element of a crime" (At p. 79).

This Court in **Frank Costello v. United States**, 383 U. S. 942, 16 L. ed. 2d 205, on March 21, 1966, granted a writ of certiorari on the basis of this same question. In **Frank Costello v. United States**, *supra*, the Court granted the writ of certiorari for consideration of the following question:

> "1. Do not the federal wagering tax statutes here involved violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment? Should not this court especially in view of its recent decision in Albertson v. Subversive Activities Control Bd., 382 U. S. 70, 15 L. Ed. 2d 165, 86 S. Ct. 194 (1965), overrule U. S. v. Kahriger, 345 U. S. 22, 97 L. Ed. 754, 73 S. Ct. 510 (1953) and Lewis. v. United States, 348 U. S. 419, 99 L. Ed. 475, 75 S. Ct. 415 (1955)?"

This petitioner submits that until a definitive determination is made by this court concerning the question of whether or not the Federal Wagering Tax Statutes violate the petitioner's privilege against self-incrimina-

tion guaranteed by the Fifth Amendment this petitioner's case should remain pending or should be heard for the purpose of determining the questions presented in this petition.

The petitioner's case, though presenting the same basic questions as the other cases now pending before this court and referred to above, presents a different facet of the same question.

The petitioner's case presents a clear example of the use of a revenue statute to force incriminating statements from a person which may be used, and are essentially for the purpose of being used, in criminal investigation and criminal prosecution. The petitioner submits that this device, using revenue statutes to obtain evidence in the aid of criminal prosecution on non-revenue charges, is in violation of the Fifth Amendment to the Constitution of the United States and is designed as a subterfuge to circumvent the constitutional restrictions on self-incriminaton.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HOOKER, HOOKER & WILLIS,

SEYMOUR SAMUELS, JR.,

WILLIAM R. WILLIS, JR.,
214 Union Street,
Nashville, Tennessee,
Attorneys for Petitioner.

APPENDIX